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Before the
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
)	
Request for Declaratory Ruling)	FCC File No. 97-_____
Pursuant to Rule 1.2 of the)	
Commission's Rules)	
)	
Amendment to the Commission's Rules)	WT Docket No. 95-157
Regarding a Plan for Sharing the Costs)	
Of Microwave Relocation)	

PETITION FOR DECLARATORY RULING

Powertel PCS, Inc. ("Powertel"), by its attorneys, respectfully submits this Petition for Declaratory Ruling ("Petition") pursuant to Section 1.2 of the Federal Communications Commission's ("FCC" or "Commission") Rules,¹ requesting the Commission to clarify its rules regarding microwave relocation cost-sharing.² By this Petition, Powertel demonstrates that there is a conflict between the cost-sharing rules as adopted in the R&O, and as finally promulgated. Specifically, the Commission's cost-sharing rules, as adopted, did not impose cost-sharing liability on a PCS licensee for the relocation of microwave paths wholly outside of that licensee's authorized Major Trading Area ("MTA") or Basic Trading Area ("BTA"). However, in certain instances, the final cost-sharing rules produce just such a result. Powertel therefore respectfully requests the Commission to issue a declaratory ruling that no cost-sharing obligation is owed for the relocation of a path that is wholly outside of a PCS licensee's MTA/BTA.

¹ 47 C.F.R. § 1.2 (1997).

² Amendment to the Commission's Rules Regarding a Plan for Sharing Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825 (1996) [hereinafter "R&O"].

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Factual Background

On April 3, 1997, Powertel received a Cost Sharing Obligation Notification (“Notice”) from the PCIA Microwave Clearinghouse. The Notice indicated a cost-sharing obligation owed by Powertel to Sprint Spectrum, L.P. (“Sprint”) for Link ID number 1773. Upon investigation, Powertel determined that this path was located wholly outside of its licensed MTA. The path was originally operated on the A Block frequency in the Nashville MTA. Sprint is the A Block licensee in the Nashville MTA. While the path was entirely within the Nashville MTA, one end point of this path was near the boundary between the Memphis/ Jackson and Nashville MTAs. Powertel is the A block licensee in the Memphis/ Jackson MTA. Powertel filed PCNs for base stations M0068 and M0069, both of which are located within the Memphis/ Jackson MTA, yet near the boundary between the two MTAs. As a result, Powertel’s base stations are within the Proximity Threshold³ for the relocated path, even though the path is in the Nashville MTA, and Powertel’s base stations are in the Memphis/ Jackson MTA. *See* Exhibit A.

After reviewing the cost-sharing rules, Powertel concluded that it did not owe a cost-sharing obligation for the path because it was wholly outside of Powertel’s licensed MTA and wholly within the relocater’s frequency block. Powertel’s conclusion is based on the R&O accompanying the final version of the cost-sharing rules. The R&O states that no cost-sharing obligation is owed when the relocated microwave path is wholly inside the relocater’s market

³ *See* 47 C.F.R. § 24.247(a). The Proximity Threshold is a rectangle extending 48 kilometers (30 miles) beyond each node and 24 kilometers (15 miles) to each side of the relocated microwave path to determine whether a PCS base station would have interfered with that path.

and frequency block.⁴ Yet the language of Section 24.247 of the Commission's Rules allows a cost-sharing obligation to accrue regardless of whether the path is within a licensee's MTA, as long as the licensee's base station is within the Proximity Threshold.

Thus, Powertel wrote PCIA describing the conflict and asserting that no obligation was owed to Sprint. PCIA's response indicated that while there did appear to be a conflict between the rule as adopted and as finally promulgated, PCIA would apply the rule as enacted, ignoring the conflict between the rules as written and the R&O. Therefore, PCIA stood by its original Notice, resulting in this Petition.

ARGUMENT

A. The "Triggering" Rule

A cursory review of the "triggering" rule, 47 C.F.R. § 24.247, without consideration of the R&O or the regulatory history, seems to suggest that Powertel's base stations create a cost-sharing obligation. This is because the rule as written ignores the MTA boundary in applying the Proximity Threshold test. Under this narrow reading of the rule, a reimbursement obligation is "triggered" when:

- (1) All or part of the relocated microwave link was initially co-channel with the licensed PCS band(s) of the subsequent PCS entity;
- (2) A PCS relocater has paid the relocation costs of the microwave incumbent; and
- (3) The subsequent PCS entity is preparing to turn on a fixed base station at commercial power and the fixed base station is located within [the Proximity Threshold] . . .

⁴ R&O, Appendix A ¶ 16.

47 C.F.R. § 24.247(a). However, a complete review of the rule, including the R&O and other regulatory history, indicates that the cost-sharing rules are not intended to trigger a cost-sharing obligation for this link.

B. The R&O Conflicts with the Rule as Promulgated

In both the NPRM⁵ and in the R&O, the Commission published a cost-sharing matrix specifying when cost-sharing obligations are owed. The R&O states:

Reimbursement, therefore, works as follows ...

	Fully Within Relocator's Block	Partly Within Relocator's Block	Outside of Relocator's Block
Both endpoints inside Relocator's MTA/BTA	No reimbursement	Pro rata reimbursement under the cost sharing formula	100 percent reimbursement (up to the cap)
One endpoint inside Relocator's MTA/BTA	Pro rata reimbursement under the cost-sharing formula	Pro rata reimbursement under the cost-sharing formula	100 percent reimbursement (up to the cap)
No endpoints inside Relocator's MTA/BTA	100 percent reimbursement (up to the cap)	100 percent reimbursement (up to the cap)	100 percent reimbursement (up to the cap)

R&O, Appendix A ¶ 16.

Applying the cost-sharing matrix to this path results in no cost-sharing obligation owed by Powertel. This is because, as shown in the upper left corner of the above matrix, the path is “fully within the relocator’s [Sprint’s] block” and “both endpoints [are] inside the relocator’s

⁵ *Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, Notice of Proposed Rulemaking*, 11 FCC Rcd 1923 (1995) [hereinafter “NPRM”].

[Sprint's] MTA/BTA".⁶ Thus, under the cost-sharing matrix proposed in the NPRM and adopted in the R&O, Sprint is not entitled to any reimbursement.⁷

This result conflicts with that of Section 24.247, as codified, and demonstrates the need for Commission clarification on the proper application of the cost-sharing rules. Powertel submits it is axiomatic that the Commission's Rules be consistent with the underlying R&O that authorizes their adoption. Moreover, the Administrative Procedure Act ("APA") requires the Commission to interpret its written rules in a manner which is consistent with the underlying rulemaking proceeding.

C. Under the Administrative Procedure Act, the FCC Cannot Interpret its Written Rules in a Manner Which Is Inconsistent with the Underlying R&O

For informal, notice and comment rulemaking, the APA requires that an agency give interested parties notice of the terms or substance of the proposed rule or a description of the subjects and issues involved. Further, when adopting final rules, the agency must "provide a

⁶ R&O, Appendix A ¶ 16; NPRM ¶ 34.

⁷ Ironically, the original proposal advanced by PCIA yields the same result as the R&O, even though PCIA is now assessing Powertel a cost-sharing obligation. NPRM ¶ 55. In discussing PCIA's original cost-sharing proposal, the Commission noted:

We tentatively concur with PCIA's proposal that a two-part test should be adopted for determining whether reimbursement is required. Thus, a subsequent licensee would be required to reimburse the PCS relocater *only if*:

- (1) the subsequent PCS licensee's system would have caused co-channel interference to the link that was relocated; and
- (2) *at least one endpoint of the former link was located within the subsequent PCS licensee's authorized market area (e.g., MTA, BTA).*

Id. (emphasis added).

concise general statement of [the rule's] basis and purpose.”⁸ The Supreme Court has insisted that agencies explain their rulemaking actions, noting that “the agency must examine the relevant data and articulate a satisfactory explanation for its action . . .” *Motor Vehicle Manufacturers Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citations omitted). Here, the R&O is the Commission's explanation of its action. As demonstrated above, the NPRM and R&O underlying the promulgated rule indicate that no cost-sharing obligation is owed in this situation. Yet the final rule, as written, produces the exact opposite result and offers no reason for the Commission’s about face. As a result, Section 24.247 of the Commission's Rules, as written, has not been properly subjected to the rigors of notice and comment rulemaking and is procedurally defective.


⁸ 5 U.S.C. § 553(c). “After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.” *Id.*

CONCLUSION

The R&O enabling the Commission's cost-sharing rules directly conflicts with the rules promulgated by the FCC regarding cost-sharing obligations for out-of-MTA/BTA microwave paths. The Administrative Procedure Act requires the Commission to interpret its rules in a manner which is consistent with the outcome of the underlying rulemaking proceeding. For the reasons stated herein, Powertel respectfully requests a declaratory ruling that Section 24.247 of the Commission's Rules does not impose a cost-sharing obligation for microwave paths which are wholly outside of a PCS licensee's authorized MTA/BTA.

Respectfully Submitted,

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Dated: September 26, 1997

Nashville MTA

Memphis-Jackson MTA

M0068

M0069

Link ID 1773

Proximity Threshold

0 15 30
Miles

